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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC VALDERRAMA,

Defendant and Appellant.

B206862

(Los Angeles County
Super. Ct. No. BA316482)

APPEAL from a judgment of the Superior Court of Los Angeles County.

C. H. Rehm, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Eric Valderrama was convicted, following a jury trial, of one count of second degree robbery in violation of Penal Code¹ section 211 and one count of assault with a firearm in violation of section 245, subdivision (a)(2). The jury found true the allegations that appellant personally used a firearm during the commission of the crimes within the meaning of sections 12022.5, subdivision (b), 12022.5, subdivision (a) and committed the crimes for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (c)(1)(C). The trial court sentenced appellant to a total term of 23 years in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in excusing Juror No. 12 during trial. Appellant also contends that the trial court erred in failing to stay sentence for one of his two enhancement terms pursuant to section 654. We affirm the judgment of conviction.

Facts

On September 20, 2006, about 5:30 p.m., Romney Paredes, his cousin Jesse and his friend Erik Torres were on Avenue 57 going toward Paredes's house. Appellant and five others crossed the street and approached Paredes and his companions. Appellant asked Torres where he was from. Torres replied, "Nowhere. I don't bang." Appellant said, "This is Avenues. They call me 'Bandit' from Avenues." Appellant told Torres to go back up the hill. This direction was away from Paredes's house. Paredes told appellant that he lived down the hill on the corner and that Torres was his neighbor. He stated that they were not doing anything.

Appellant demanded Paredes's bicycle. Paredes refused to give it to him. Appellant pulled out a gun, a black .38 special, pointed it at Paredes's face and demanded the bicycle. Paredes again refused. Appellant pistol whipped Paredes. Paredes gave up the bicycle.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

The next day, appellant and some friends came to Paredes's house with the bicycle and taunted him. Appellant said, "I got your bike. What are you going to do about it?"

Paredes did not report any of appellant's activities to the police because he was afraid of retaliation. Later, on September 29, Paredes encountered Los Angeles City police officers while they were searching for some men. Paredes told the officers what appellant had done.

Later, on September 29, police officers attempted to contact appellant as he stood in the driveway of an apartment building on Avenue 57. Appellant fled, discarding a .38 handgun as he went. Still later that day, appellant was observed near Harmon Park and arrested.

At trial, Los Angeles Police Officer Curtis Davis testified as a gang expert. He identified appellant and two of his companions during the crimes as members of the Avenues gang. Officer Davis testified about the nature and criminal activities of the Avenues gang, and explained how a crime like appellant's could benefit that gang.

Discussion

1. Juror excusal

Appellant contends that the trial court abused its discretion in removing Juror No. 12 from the jury during trial because that juror's inability to perform as a juror does not appear in the record as a demonstrable reality. We see no abuse of discretion.

A trial court's authority to discharge a juror is governed by Penal Code section 1089, which provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate"

A trial court's decision excusing a juror is reviewed for an abuse of discretion. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) If there is any substantial evidence supporting the trial court's ruling, it will be upheld on appeal. (*Ibid.*) However, a juror's

inability to perform as a juror must appear in the record "as a demonstrable reality."
(*Ibid.*; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

It is well settled that good cause exists to excuse a juror when he cannot perform his duties as juror, loses the ability to render a fair and unbiased verdict, and states his doubts as to his ability to perform his duty justly. (*People v. Warren* (1986) 176 Cal.App.3d 324, 327.) Removal of a juror can occur when he "becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1100 [juror's anxiety over new job would affect deliberations]; *People v. Dell* (1991) 232 Cal.App.3d 248 [juror in auto accident]; *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 629 [juror unable to concentrate].)

Here, the record shows that during the prosecution's case, Juror No. 12 sent the following note to the court: "Please excuse me from the trial because I cannot handle this case anymore. I am a very emotional person beginning to sense symptoms of depression. My emotions will not allow me to reach a verdict. Therefore, I do not find myself suitable as a juror any longer. Thank you for your understanding."

The court then had the following exchange with Juror No. 12 on the record:

The court: "So we thank you for your note, and we thank you for telling us when you think there may be a problem with you performing your duties as a juror. Trials are tough. They are tough on jurors and participants and court staff. [¶] Here is the situation: It looks like we are not going to finish this trial today. So we are going to have tomorrow, Saturday; Sunday. Monday is a court holiday. It's Martin Luther King day. So we're going to have three days off. [¶] Do you think with those three days off, away from this experience, you would be able to come back more refreshed: 'yes' or 'no'?"
Juror No. 12 replied: "No."

The court asked: "Okay. Why do you think that is?" Juror No. 12 replied: "Because the last two nights, I can't sleep. And he is so young, and I don't know."

The court stated: "I can see you are getting upset in the courtroom. Would you like a – you have a tissue. [¶] So the issue is: Do you think you would be able to sit here

for the remainder of the trial and listen to the testimony and then, after the testimony, listen to instructions on the law and, after those instructions, listen to the arguments of the attorneys and then keep all of these things in mind and go back and discuss the evidence and the arguments and the instructions with 11 fellow jurors or not? And you are the only person that can tell us."

Juror No. 12 asked: "For today?" The court clarified: "For the rest of the trial." Juror No. 12 responded: "It's becoming worse and worse – my feelings. So it's very tough for me. . . . I thought I was a strong person, but not."

The court replied: "Okay. Just compose yourself. You are doing fine. Let me see if there are any questions from the attorneys." The prosecutor had no questions.

Appellant's counsel asked a number of questions. Juror No. 12's responses to the first four questions were inaudible. Appellant's counsel said: "You told us that we can count on you, and we picked you. You were one of the chosen." Juror No. 12 responded, "I never had the experience to being tried or in the courts; so I thought I was watching shows and it was normal. And everything here that I heard and everything just in the movies everything –." Appellant's counsel said, "And so what you are saying is that this is a very real experience. It's not like what you experienced when you were watching a movie or a TV?" Juror No. 12 answered, "Just a movie. But I didn't realize that close, that real life." Appellant's counsel then submitted the matter.

The court stated that its tentative ruling was "to excuse Juror No. 12. She was tearful. She was barely composed. She has given us a note that says, because of her emotional situation, she doesn't feel she can continue this trial and perform her duty as a juror."

After listening to arguments from both parties, the court ruled, "It appears to the court that Juror No. 12, based on her demeanor here while talking to the attorneys and the court as well her statements verbally and in writing, is too emotional to perform her duties as juror in this case. And consequently, the court finds good cause to excuse her."

We see no abuse of discretion in the trial court's ruling. Juror No. 12 was crying, upset and reported that she was unable to sleep. She stated that her emotional state would

prevent her from reaching a verdict. She also indicated that it was becoming worse and worse for her as the trial went on. Her answers to questions were often inaudible. The juror's statements and actions and the trial court's observations are sufficient to show that the juror was unable to perform her duties. Thus, the trial court did not abuse its discretion in excusing her.

Appellant contends that it is not uncommon for jurors to become emotional during a criminal trial. Perhaps not. In this case, however, Juror No. 12 was not merely emotional, she was "barely composed" and unable to sleep. She stated that the situation was getting worse for her as the trial went on, even though, as the prosecutor pointed out, there had been nothing "so disturbing as, say, dead individuals or gory pictures or somebody that would warrant or could normally warrant this amount of distress [that] has been shown."

Appellant also contends that Juror No. 12 did not say that she could not listen to the remainder of the trial or deliberate. Appellant is mistaken. In her note, Juror No. 12 clearly wrote, "I cannot handle this case anymore." She also wrote, "My emotions will not allow me to reach a verdict."

Appellant further contends that the trial court should have waited until after the holiday weekend to excuse Juror No.12. He speculates that she might have decided over the weekend that she could perform her duties after all. The court suggested to Juror No. 12 that a break might refresh her, but she felt strongly that it would not. We see no abuse of discretion in the trial court's decision to accept Juror No. 12's assessment that a break would not help.

Appellant also contends, in effect, that the trial court was required to obtain a doctor's evaluation of Juror No. 12 before the court could discharge the juror. Appellant has not cited any authority for such a requirement, and we are not aware of any. The trial court reasonably based its conclusion on Juror No. 12's statements and demeanor, both of which showed significant and increasing distress which was interfering with her ability to perform her functions as a juror.

2. Enhancements

Appellant contends that the section 12022.53, subdivision (b) enhancement and the section 186.22, subdivision (b) enhancement are both based on the fact that he used a gun. He concludes that imposition of both enhancements violates section 654.

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Thus, the "section prohibits multiple sentences where a single act violates more than one statute, or where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1514.)

A 10-year enhancement pursuant to section 186.22, subdivision (b) may only be imposed if the defendant is convicted of a violent felony as defined in section 667.5, subdivision (c). (§ 186.22, subd. (b)(1)(C).)² Robbery is such a felony. (§ 667.5, subd. (c)(19).)

Appellant contended in the trial court that his unlawful taking of property from the victim was robbery (rather than theft) only because he used a gun in the commission of the taking. Thus, he contends that the imposition of the 10-year section 186.22 enhancement was predicated on his gun use. He contends that since gun use was the basis of the section 12022.53, that gun use cannot be used again to support the section 186.22 enhancement as well as the section 12022.53 enhancement.

In the trial court, appellant relied on the reasoning of *People v. Rodriguez* (2007) 157 Cal.App.4th 14. In that case, Division Four of this District Court of Appeal held that

² A five year enhancement term may be imposed under section 186.22 if the felony is a serious felony within the meaning of section 1192.7, subdivision (c). A two, three, or four year enhancement term may be imposed for any felony conviction. (§ 186.22, subds. (b)(1)(B), (b)(1)(A).)

section 654 bars the imposition of both an enhancement for the use of a firearm within the meaning of section 12022.5 and a 10-year term for a gang enhancement pursuant to section 186.22, subdivision (c)(1)(C). Our Supreme Court subsequently granted review in that case. (March 12, 2008, S159497.) However, even if *Rodriguez* was still good law, it would have no direct bearing on this case. The Court of Appeal in *Rodriguez* noted that in *People v. Palacios* (2007) 41 Cal.4th 720, the California Supreme Court had construed language in section 12022.53 as creating an exception to section 654. The court pointed out that section 12022.5 had no language similar to that of section 12022.53 which might be construed as creating an exception to section 654.³

We share our colleagues' understanding of *People v. Palacios, supra*. In that case, our Supreme Court stated that "in enacting section 12022.53, the Legislature made clear that it intended to create a sentencing scheme unfettered by section 654." (*People v. Palacios, supra*, 41 Cal.4th at pp. 727-728.) As the Court explained, "subdivisions (b), (c) and (d) of section 12022.53 repeatedly and expressly mandate that '[n]otwithstanding any other provisions of law,' the defendant 'shall be punished' by a consecutive and additional term of imprisonment." (*Id.* at p. 728.) Thus, it does not appear that section 654 would bar the imposition of an enhancement in addition to a section 12022.53 enhancement.

On appeal, appellant relies on *People v. Eck* (1999) 76 Cal.App.4th 759 to show error. That reliance is misplaced. Neither of the enhancements in *Eck* was a section

³ Further, in *Rodriguez*, the underlying conviction was assault with a firearm, which is not itself a violent crime within the meaning of section 667.5 subdivision (c). The assault qualified as a violent felony under section 667.5, subdivision (c)(8) as "any felony in which the defendant uses a firearm which use has been charged and proved as provided in . . . Section 12022.5." Thus, the section 12022.5 enhancement, not the substantive offense, triggered the violent felony provision of section 186.22. Robbery is a violent felony in its own right under section 667.5, subdivision (c)(9). Firearm use is not required. The section 12022.53 true finding in this case was not used to support the violent felony provision of section 186.22.

12022.53 enhancement. That case involves two enhancements for great bodily injury, one imposed pursuant to section 12022.7, the other pursuant to section 12022.55.

Further, even if section 654 did apply to the enhancements in this case, we would still find no error in the trial court's ruling. The trial court found that section 654 would not apply in the present case because appellant had two separate objectives in using the firearm: to benefit the Avenues gang and to acquire the victim's personal property.

Multiple punishment is permitted under section 654 when a defendant harbors separate though simultaneous objectives in committing statutory violations. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952; *People v. Garcia, supra*, 153 Cal.App.4th at p. 1514.) Here, as is the situation in many gang cases, it is reasonable to infer that appellant intended to benefit himself by acquiring the victim's personal property and to benefit his gang by instilling fear in the community. Thus, appellant had separate objectives in committing his statutory violations and section 654 did not apply.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.